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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. [redacted] 49

HARRY W. SIMPSON, EDWARD F. SIMPSON AND F. W. SIMPSON, JR., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF SIMPSON CONSTRUCTION COMPANY, *Petitioners,*

vs.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

GILES J. PATTERSON,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 750

HARRY W. SIMPSON, EDWARD F. SIMPSON AND F. W. SIMPSON, JR., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF SIMPSON CONSTRUCTION COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND SUPPORTING BRIEF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named Petitioners respectfully pray for a Writ of Certiorari to the Court of Claims of the United States to review a summary judgment of that Court entered February 5, 1952.

(A certified transcript of the record in this case in the Court of Claims is furnished herewith in accordance with Rule 41 of this Court.)

Jurisdiction of the Courts

The Court of Claims had jurisdiction of this cause under Public Law No. 657, 89th Congress, Act of August 7, 1946, Ch. 844 Stat. 902, as amended by 62 Stat. 869, 41 U. S. C. A. 106 note:

> Sec. 1. "Where work supplies or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under Section 291 of the First War Powers Act, 1941 (50 U.S.C., Supp. IV, App., Sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President * * * to consider, adjust and settle equitable claims of contractors * * * for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts, * * *"
>
> Sec. 3. "Claims for losses * * * shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945."
>
> Sec. 6. "Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed $10,000 in amount or suit has heretofore been brought or is brought within thirty days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which

such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition to the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court under this section may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory act (June 25, 1948) be transferred to the Court of Claims for original disposition in that court."

Jurisdiction of this Court is invoked under Title 28, Sec. 1255, U. S. C.

Question for Decision

This case presents only one question of law; there are no issues of fact. The sole issue of law was raised by respondent's motion for summary judgment (R. 16): Did the Court of Claims have jurisdiction?

The motion was sustained and summary judgment was entered—dismissing the Petition.

Statement

Petitioners had been and were engaged in the construction of public works on August 24, 1943. Previously, they had successfully completed a number of Defense Construction projects under contracts with various administrative agencies of the United States. On the date named, they entered into Contract No. C2ca2053 with the Civil Aeronautics Administration of the Department of Commerce for grading, draining, and seeding or sprigging the Titus-

ville-Cocoa, Florda airport. (Petition p. 1 et seq., also Exhibit "1").

Work was begun September 14, 1943 and performance continued under the terms of that contract as altered, modified or amended by orders of the Administrative Officers of the Respondent (including the engineers in charge of supervising construction) until September 15, 1944, when Respondent terminated Petitioners' right to proceed further. (Petition, Par. 1, R. p. 1)

The cost to Petitioners of performing the work above described, amounted to approximately $711,440. Respondent, and its officials, however, awarded or allowed to Petitioners only $467,423.95. (Petition, Par. 2) In consequence, Petitioners, without fault or negligence on their part, suffered an actual loss equal to the difference between the sums named of approximately $244,016.05, with a net loss on all their contracts with the United States between October 6, 1942 and August 14, 1945 of more than $126,000. (Petition, Par. 2, R. p. 1)

The cost to Petitioners on the project was a reasonable cost for the performance of work *actually performed* by them under the conditions and circumstances set out in detail in affidavit (Exhibit "27") attached to Petitioners' Exhibit "1."

On November 10, 1944 (prior to August 14, 1945) Petitioners filed with the Administrative Officers of Respondent a "written request for relief" of losses and for "an equitable adjustment" in the amount to be paid them by Respondent for work, supplies and services furnished by them in connection with the project. (Exhibit "1") The contracting officer, instead, allowed them only $92,355.24, all of which purported to be based "upon the contract," computed according to contract unit prices or at unit prices

arbitrarily fixed by the officer. He ignored the "request for relief" for the loss sustained by Petitioners and the authority given him by the First Wartime Powers Act and Executive Orders 9001 and 9116 to relieve the same. The Assistant Secretary of Commerce reduced the amount allowed to $74,441. Exhibit 3. (This sum is included in the total of $467,423.95.)

Within six months after the passage of Public Law 657, Petitioners filed a "written request for relief" with the Civil Aeronautics Administration, in accordance with the provisions thereof. (Exhibit 2) On May 3, 1948, the Administrator,—without considering the merits thereof and without according Petitioners a hearing—denied the request in its entirety, asserting that Petitioners had not filed a "written request for relief" with respect to the loss in question, prior to August 14, 1945. (Exhibit 6). That assertion is contradicted in terms by Exhibits "1" and "4."

On the 20th day of June, 1949 (R. p. 1), Petitioners filed their Petition in the Court of Claims, under the authority of Section 6, Public Law No. 657. Respondent moved for entry of a summary judgment on the sole ground that there was "no genuine issue as to an essential jurisdictional fact, to wit, whether plaintiffs filed a written request for relief with any department or agency on or before August 14, 1945." (R. p. 16) It thereby admitted the allegations of fact in the Petition.

The opinion of the Court of Claims held that Exhibit "1," filed November 10, 1944, and its contents, did not indicate:

> "that the *only* relief available would be relief as a matter of grace, and we do not see how such a document could have placed the Civil Aeronautics Administration upon notice that it was being asked to grant plaintiffs such extra legal relief;"

because

> "all of the claims asserted in said document were claims which, if completely established, would have entitled plaintiffs to relief under the terms of their contract."

It did not consider Exhibit 4, filed May 21, 1945.

The first of these quotations is predicated upon its conclusion in the second, and is inconsistent with and contrary to the decision of this Court in *Fogarty* v. *U. S.*, 340 U. S. p. 10, where it was held:

> "There is no definition of the term (written request for relief) in the Act or regulations;"
>
> "The Legislative history of the Act does not show that any settled usage of the term was brought to the attention of Congress;"
>
> *"No particular form of notice is required."*

The only requirement of the statutory phrase "written request for relief" is, this Court added, that it

> "must be sufficient to apprise the agency that it was being asked to grant extra legal relief under the War-time Powers Act for losses sustained in the performonce of war contracts."

The Order of the Court of Claims granting this judgment, being based on defendant's motion, necessarily was a decision that the Court had no jurisdiction. A decision of that question necessarily required the Court to consider the nature and purpose of the documents or "written requests" that had been filed by Petitioner prior to August 14, 1945. This Court in the Fogarty case—as the Court of Claims did in its earlier decisions—rested its decision on the substance and intent of the written requests—their nature and purpose—and held that there was no particular form of notice required. It was essential to the Court's decision it should

hold that under no circumstances could the written requests be held to have given notice to the agency that "it was being asked to grant extra legal relief under the War Powers Act for losses sustained in the performance of war contracts." The decision of this Court in the Fogarty case, that the documents there relied on as "written requests for relief" were not sufficient, was based not only on the nature and contents of the documents themselves, but upon the fact that the Petitioner himself had relied upon those documents in the Bankruptcy Court as the basis for a "counterclaim for judgment" with full knowledge that the Bankruptcy Court "had no jurisdiction to award extra legal relief under the First War Powers Act." The opinion of the Court of Appeals (176 F. (2) 599) also rested on that finding. In this case, however, the "written requests" of these Petitioners were not filed with a Court but with the Administrative agency which had been given power by the First Wartime Powers Act to grant "extra legal relief * * * for losses sustained in the losses of war contracts." *Fogarty* v. *U. S.*, 340 U. S. 10.

Executive Order 9001 (supplemented by Order 9116) authorized the Aeronautics Administration to modify or amend contracts "with or without consideration * * * irrespective of time or circumstances * * * and irrespective of rights which may have accrued." Sections 3 and 4 of Petitioners' contract merely provide that Petitioners may request relief under the provisions of those orders and the statute. It was the statute and Executive orders which granted power to Administrative Officers to arbitrarily amend contracts after execution, to require additional work, to do work other than according to the contract, and to make amendments without consideration and without limit as to the time or circumstances or the rights that may have accrued previously. These were arbitrary powers granted to the officers, which did not create rights under the contract itself. Sections 3 and 4 recognize that any increase in com-

pensation would be a matter of grace and not as of legal right. In fact, Public Law 657 was passed to restore to those Administrative Officers power to grant "extra legal relief for losses" resulting from the performance of a contract, and to give the Court of Claims jurisdiction to consider whether an additional amount should be allowed, if Petitioners were dissatisfied with that made.

A mere reading of the Court of Claims opinion is sufficient to indicate that it was based largely on its conception of the report of the Administrative Officer (Exhibit "3") rather than upon its own independent conclusion as to the nature of the "written requests" made by Petitioner. It expressly held that the additional sums allowed for services was under the provisions of Sections 3 and 4 of the Contract, which it referred to as "contract claims". They were not "claims" of right, not legal obligations; they were in fact a grant of extra legal relief under power derived from the First Wartime Powers Act and the regulations promulgated pursuant thereto.

Hence, the statement that "all of the claims" in the request of November 10, 1944 (Exhibit "1") "were claims which, if completely established would have entitled Petitioners *to relief* under the contract," is meaningless. Its reference to relief "under the contract" implies that it was not relief under the War Powers Act, but under a claim of legal right. The language of Section 3, however, shows that it was merely an agreement to exercise powers granted by the Wartime Powers Act, which this Court said authorized "extra legal relief for equitable adjustment" of losses. The distinction which the Court attempted to draw is obviously an argument over words; it is merely a refinement of the meaning of "written requests for relief" to justify a refusal to consider them.

The Court also narrowed the Act by holding that the form of the "request" included in the document of November 10,

1944, did not indicate "that the *only relief* available would be relief as a matter of grace," and therefore did not give notice to the Administration that it was requested to grant extra legal relief under the Wartime Powers Act, for losses. This statement is contrary to this Court's decision that no particular form is prescribed.

If the Court had considered the nature and substance,—the purpose and intent—of the documents filed November 10, 1944, it would not have made that finding. The request is thirty-two pages long, and—in the light of subsequent events,—as the Court of Claims said in *Modern Engineering Co.* v. *U. S.*, 83 Fed. Supp. 346, may be "inartistically drawn". But the nature and purpose of that document can not be denied by superficial refinements of a definition of the statutory phrase.

Petitioners' "written request" was for extra legal relief under the Wartime Powers Act for losses which they had sustained.

> "It alleged its loss under that contract, it asked reimbursement for additional expenses."

It made

> "a timely protest to the contracting agency concerning the losses;"

and

> "gave the agency an opportunity to either grant or deny their claims."

(The above quotations are from the opinion of the Court of Claims in *Modern Engineering Co.* v. *U. S., supra.*) It alleged that the loss was not due to any fault or negligence of the Petitioners.

The following selected excerpts show the general nature and purpose of the instrument:

"The basis of this claim is that the work actually performed by the contractors pursuant to the orders and directions of the representatives of the Government was so materially different from the work described in the invitation for bids that to measure their compensation by the unit price named in the Contractor's bid would be grossly inequitable."

"An equitable adjustment in the instant case requires an abandonment of the unit prices bid by the contractors and the measurement of their compensation by the actual cost of the work done by them, plus a reasonable profit."

"The grading work actually performed by the Contractors bore little resemblance from a cost standpoint to the work indicated by the drawings and specifications upon which the unit prices were based."

"In such a case an equitable adjustment demands the abandonment of the unit price and the payment of the contractor on a cost plus basis instead."

"It is submitted that, if any case ever demanded an equitable adjustment, this is such a case. It is not believed to be the policy of the Government to permit its contractors to suffer financial ruin in the performance of contracts because of conditions beyond their control and because of conditions for which the Government is responsible. In this case the Contractors were more than $50,000 lower than the next lowest bidder on the work as described in the proposal. Through no fault of the Contractors, the work actually required differed materially from that described in the proposal. In a diligent effort to achieve the results desired by the Government, the Contractors have incurred actual costs in a sum nearly double the total amount of their bid. These costs are reasonable costs for the performance of the work in the circumstances under which it had to be performed, as shown by the affidavit of an experienced and reliable contractor for similar work, hereto attached as Exhibit 27. The contracting officer should allow these costs plus a reasonable profit."

None of these requests can be said to be based upon Sections 3 and 4 of the contract. They were certainly broad and general claims for extra legal relief from loss under the First Wartime Powers Act, for an "equitable adjustment" under the facts and circumstances alleged, in such amount as the Administrative Officers might allow under the statute and the executive orders. The Lucas Act authorizes a Petition to the Court of Claims if the amount allowed is not satisfactory to Petitioners. There was no standard for measuring the amount of extra legal relief that could or should be granted, nor did the statute or the executive orders authorizing the Administration to make such allowances, draw a technical distinction between allowances specifically designated as "additional compensation" and those allowed as "relief from losses." The petition alleged that unit prices should not control the amount; the contract contained no provision that would have given Petitioners a legal right to recover on quantum meruit. Any "claim" under Sections 3 and 4 for "equitable adjustment" of loss was necessarily a matter of grace. It could not create a legal right enforcible against the Government. This is the necessary implication of this Court's statement in the Fogarty case.

The Court of Claims further limited the type of requests that it will consider under the Lucas Act to those which indicate that "the *only relief* sought is a matter of grace." Such a requirement would require the contractor to file a separate document—one for sums claimed to be due under the express terms of the contract, the other, a written request for relief of loss as a matter of grace; or to waive claims of legal right in order to obtain relief as a matter of grace. Both of these requirements relate to the form of the request and not to its substance. As a practical proposition, a contractor could not ask relief under the Wartime Powers

Act for losses only, until he first knew the amount to which he was entitled as a matter of right. If that were sufficient, he would have no loss.

The decision of the Court of Claims is also inconsistent with the express provisions of Section 3 of Public Law 657 that "a previous settlement under the First Wartime Powers Act or the Contract Settlement Act of 1944 does not operate to preclude further relief otherwise allowable under this Act ."

Howard Industries v. *U. S.*, 83 Fed. Supp. 377;
Spicer v. *U. S.*, 83 Fed. Supp. 345.

If the allowance of a request under the former acts does not bar further relief under the present Act, how can a "written request" for an "equitable adjustment" of "losses" incurred by reason of the provisions of Sections 3 and 4 of the Contract, constitute a bar to such relief?

The Court of Claims gave no consideration to the second "written request for relief" (Exhibit "4"). Particular attention is directed to paragraphs 17, 18, 19 and 20 which are as follows:

> 17. "Because the said S. A. Kemp as Administrative Officer failed to make an equitable adjustment by allowing the contractor the monies claimed by the contractor under the original and supplemental claim plus a reasonable profit of fifteen per cent."
>
> 18. "Because the said S. A. Kemp as Administrative Officer failed to award the contractor a just and equitable sum for admitted loss under the contractor's stabilization claim".
>
> 19. "Because the said S. A. Kemp as Administrative Officer failed to award the contractor a just and equitable sum for admitted loss under contractor's drainage claim."
>
> 20. "Because the said S. A. Kemp as Administrative Officer failed to award the contractor a just and

equitable sum for admitted loss under contractor's grading claim."

The language of these paragraphs is consistent with and supplemental to Exhibit "1". It made obvious to the Administration that Petitioners were seeking extra legal relief from loss which they had sustained. That Notice was filed May 21, 1945, within the time allowed by the statute. It should have been considered and given effect.

Reasons for Allowance of the Writ

1. The United States Court of Claims has decided an important question of Federal Law, to-wit: the limit of its jurisdiction under Public Law 657, 60 Stat. 902, commonly known as the Lucas Act, in a way probably,—and as we contend—definitely in conflict with the only decision of this Court construing and applying that statute (*Fogarty* v. U. S., 340 U. S. 10).

2. The opinion of the Court of Claims that it had no jurisdiction of this cause, decided an important question of Federal Law which—if it has not been—should be settled by this Court; for the decision of the Court of Claims is in conflict with previous decisions of that Court although its opinion did not reverse or modify its earlier decisions. The Court of Claims cited and quoted from the opinion of this Court in *Fogarty* v. *U. S., supra,* but its decision is in conflict with the principles of Law announced by this Court in its decision in that case.

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PATTERSON, FREEMAN,
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BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

Argument

The decision of the Court of Claims that it did not have jurisdiction rested on its express finding that Petitioners had not complied with Section 3, Public Law 657, known as the Lucas Act, in that they had not filed a "written request for relief" under their contract with the Government, prior to August 14, 1945. The record shows conclusively that Petitioners filed two "written requests for relief" with the Civil Aeronautics Administration prior to that date. But the Court held that the first of these was not sufficient to give it jurisdiction of the cause and did not refer to or rule upon the sufficiency of the second.

It reached its conclusion by circuitous reasoning, involving finespun distinctions based on the use of words or "catch phrases". Its opinion indicates that its conclusion was not the result of an independent examination of Exhibit "1" filed November 10, 1944, but was largely influenced by the report of the Administrative Officer (Exhibit "3").

Before the decision of this case, this Court had decided *Fogarty* v. *U. S., supra.* We have quoted from that decision in our Petition.

The Court of Appeals in its opinion in that case said:

> "They do not purport to be a claim for the difference *between the contract price* for the performance of any of the Waterways contracts and the *actual cost* to Waterways for such performance, the claim involved in this action and presented to the Navy Department for the first time in February 1947."
>
> 176 Fed. (2) 599.

Previous to the decision of the *Fogarty* case, the Court of Claims had said in *Howard Industries* v. *U. S.*, 83 Fed. Sup. 337,

> "Such request for a redetermination of the contract

> price because of an operating deficit is, we believe, a request for relief with respect to losses incurred in the performance of the contracts. The Government does not dispute this fact . . ."

and in *Modern Engineering Co.* v. *U. S.*, 83 F. Sup. 346,

> "The Plaintiff has alleged in its petition that its claim is 'filed prusuant to the provisions of said act, Public Law 657, supra, providing the right of the claimant to petition any federal court of competent jurisdiction for relief if such claimant is dissatisfied with the action of the department,' and while plaintiff's petition is somewhat inartistically drawn we are of the opinion that these allegations are sufficient to comply with the requirements of the act."
>
> *Milwaukee Eng. & S. Co.* v. *U. S.*, 83 Fed. Supp. 348.

The First Wartime Powers Act, supplemented by Executive Orders 9001 and 9116, conferred upon officials in charge of construction, extraordinary powers to make changes in contracts and to increase compensation to be paid for work done. (See the provisions of Executive Order 9001.) That power was incorporated in Articles 3 and 4 of the contract with an assurance to the contractors that they would be equitably compensated therefor. This was a recognition of a moral obligation to compensate against losses, especially since the last sentence of Article 3 declared that "nothing provided in this Article shall excuse the contractor from proceeding with the prosecution of the work so changed."

The provisions of Articles 3 and 4 did not give the contractor any legal right that could be made the basis of an enforcible claim for any specific sum.

As a condition to exercise the powers to make changes, it was necessary that the Agency determine that the modification, amendment or alteration "would facilitate the prosecution of the war." Performance and the cost of performance were subordinated to wartime needs.

The statute and Executive Orders did not authorize the Agency to create binding obligations of the Government beyond the terms of the contract, but only to make extra legal allowances or payments, or adjustments in recognition of the moral obligation arising from requiring the contractor to continue work, without regard to plans and specifications or to do them in some other way that would increase his costs. Petitioners relied upon these assurances, unenforcible though they were by law.

When the Government terminated performance by Petitioners, they had, without fault or negligence, practically completed the project at a cost of nearly twice the contract price. Pursuant to the provisions of the contract and Statute, it made a "request" of the Administrative Agency (Exhibit "1") reciting the difficulties encountered, the differences between the project constructed and the one described by the Plans and Specifications, the reasons for delay in completion, and a detailed statement of the cost to them of performing the work in accordance with the changes in plans and orders of the officials. To that request were attached numerous supporting exhibits, letters, affidavits, etc., to show that their cost was reasonable for the work actually performed by them.

The Petition for Certiorari contains quotations from Exhibit "1" which indicate the nature of that request and show that it sought "relief" from loss.

The Notice of Appeal from the Officer's report (Exhibit "4") again claimed a just and equitable sum for the loss sustained, equitable adjustments thereof, etc., as shown by the paragraphs quoted therefrom in the Petition. Under the terms of the Act and executive orders, the maximum amount they could receive would not exceed $126,000, their net loss on all contracts.

The extraordinary powers granted to the Administrative Officers expired (or were assumed by Congress to have expired) on August 14, 1945, and the Lucas Act was passed, to

authorize the agencies to again grant extra legal relief for losses. It declared that a grant under the previous acts would not bar further relief. Petitioners then filed a "request" with Civil Aeronautics Administration under that Act (Exhibit "2"). This was denied on the ground that none had been filed prior to August 14, 1945.

To determine whether the lower Court had jurisdiction, this Court must consider the purpose and intent or nature of, the "request" filed by Petitioners November 10, 1940 (Exhibit "1" and exhibits attached), and Exhibit "4", to ascertain whether it was such a "written request for relief" as Section 3 required should have been filed prior to August 14, 1945. The test to be applied is as this Court said in *Fogarty* v. *U. S., supra,* whether they were "sufficient to apprise the agency that it was being asked to grant extra legal relief under the First War Powers Act for losses sustained in the performance of war contracts." "No particular form of notice is required." The only limitation placed upon that phrase by the Fogarty decision was that the "claim" must have been an "equitable" one,—that is, not an enforcible legal obligation: a "request" as distinguished from a claim of right.

This Court construed the War Powers Act as having authorized "equitable claims * * * for losses * * * in the performance of contracts," and "fair and equitable settlement of (equitable) claims." A claim for relief "for losses in the performance of such contract" was held to be such an "equitable claim" by the Court of Appeals in its decision 176 Fed. (2) 599. Petitioner's "request" did not assert legal contract rights in a court as Fogarty did. Their request was that the Agency exercise its extraordinary powers to grant "extra legal relief * * * for loss sustained," for an "equitable adjustment". Petitioners had in good faith, carried out the contract as modified by orders of the agency.

"Extra legal relief" was authorized by the First War Powers Act, as well as by the Lucas Act. The Court of Claims described "claims" under Article 3 as "claims under the contract", but did not recognize that this Court held that "equitable claims" under the First War Powers Act were for "extra legal relief,"—were for "equitable adjustment." There is no difference between a "request" under that Act and that referred to in Section 3 of the Lucas Act, Public Law 657 so long as it was for relief against loss.

Prior to the decision in *Fogarty* v. *U. S., supra,* the Court of Claims had recognized that "written requests for relief" filed prior to August 14, 1945, should receive a liberal construction to carry out the moral obligation of the Government. This Court apparently followed that rule, though it held that Fogarty's claims were not "requests for relief" under the War Powers Act.

The Court of Claims has seized upon statements in that opinion to extend that decision far beyond its intent.

This Court should give full effect to the grant of grace by Congress, should carry out the purpose of the Act, subject to its express limitation without gratuitously giving to it an effect that would tend to defeat the primary objective of the Act.

We submit that this Court should reverse the judgment of the Court of Claims, require it to take jurisdiction of the case, hear the evidence presented and determine:

(a) Whether Petitioners have suffered a loss;
(b) Whether the Petitioners loss was the result or their own fault or negligence;
(c) The amount that should be awarded to them by way of equitable adjustment;
(d) Enter a judgment accordingly.

GILES J. PATTERSON,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 49

HARRY W. SIMPSON, EDWARD F. SIMPSON and F. W. SIMPSON, JR., Co-Partners Doing Business Under the Firm Name and Style of SIMPSON CONSTRUCTION COMPANY, *Petitioners*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 18-30) is reported at 102 F. Supp. 562.

JURISDICTION

The judgment of the Court of Claims was entered on February 5, 1952 (R. 31). The petition

for a writ of certiorari was filed on May 3, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly applied the principle of *Fogarty* v. *United States*, 340 U. S. 8, in holding that the procedures invoked by petitioners under a standard form government construction contract did not constitute a written request for relief within the meaning of Section 3 of the Lucas Act so as to qualify petitioners for the extraordinary benefits provided by that statute.

STATUTORY PROVISION INVOLVED

Section 3 of the War Contract Hardship Claims Act, popularly known as the Lucas Act, adopted August 7, 1946, 60 Stat. 902, 41 U.S.C., Supp. IV, 106, note, provides in pertinent part:

> Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act [August 7, 1946], *and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945*, * * *. [Emphasis supplied.]

STATEMENT

This case arises out of the performance of a government contract for the grading, draining, and seeding or sprigging of the Titusville-Cocoa, Florida, Airport (R. 5-16). The contract contained the usual provisions of standard government construction contracts relating to changes, changed conditions, inspection, and the settlement of disputes concerning questions of fact by the contracting officer (R. 7-9, 12). Liquidated damages for delay were established and fixed by the contract at the rate of $750 per day (R. 10-11, 22).

Notice to proceed was issued effective September 10, 1943 (R. 1). However, neither the first runway nor the entire project was completed within the contract time as extended, and on September 15, 1944, petitioners' right to proceed was terminated (R. 1, 22). Liquidated damages for delay were assessed in the amount of $201,750 (R. 22, Ex. 1, p. 3).

Thereafter, on November 10, 1944, petitioners submitted to the contracting officer named in the contract a claim for elimination of all claims for liquidated damages for delay and for allowance of additional compensation under articles 3 and 4 of the contract on account of additional costs alleged to have been incurred (Ex. 1).[1] On April 16, 1945,

[1] By stipulation (R. 31), the Exhibits have not been printed but have been filed with the Clerk.

the contracting officer rendered his decision on petitioners' claim, allowing petitioners $92,355.24 as additional compensation and remitting a substantial portion of the liquidated damages previously assessed (Ex. 3). Petitioners, on May 21, 1945, and pursuant to the terms of the contract, took an appeal from the contracting officer's decision to the head of the department (Ex. 4). On appeal the contracting officer's decision was generally affirmed except for one item of additional cost, and the net amount allowed petitioners under articles 3 and 4 of the contract was reduced to $74,441.10 (Ex. 5).

On February 3, 1947, petitioners filed a claim under the Lucas Act with the Civil Aeronautics Administration (Ex. 2). The Civil Aeronautics Administration denied petitioners' claim in its entirety upon the ground that the petitioners had not, prior to August 14, 1945, filed a written request for relief for losses within the meaning of Section 3 of the Lucas Act (Ex. 6). Petitioners then instituted this suit in the Court of Claims. At a pre-trial proceeding petitioners submitted the claim presented to the contracting officer (Ex. 1) and the appeal taken from the contracting officer's decision (Ex. 4) as the documents upon which they relied as written requests for relief for losses filed with the contracting agency prior to August 14, 1945. Thereafter, the Court of Claims granted respondent's motion for summary judgment upon the ground that petitioners had not, prior to Au-

gust 14, 1915, filed a written request for relief from losses within the meaning of Section 3 of the Lucas Act (R. 31).

ARGUMENT

1. This case presents the narrow question whether the Court of Claims correctly applied the principle of *Fogarty* v. *United States,* 340 U. S. 8, to the particular facts of this case. We submit that the Court of Claims correctly applied that principle in holding that the claim filed by petitioners with the contracting officer of the Civil Aeronautics Administration and petitioners' appeal from the contracting officer's decision on that claim did not constitute a written request for relief within the meaning of Section 3 of the Lucas Act.

In the *Fogarty* case, *supra,* this Court considered the question whether a claim for compensation for requisitioned property and a number of invoices seeking compensation for goods and services allegedly furnished, all of which had previously been submitted to the Navy Department, constituted written requests for relief within the meaning of Section 3 of the Lucas Act. In its opinion in that case this Court said (340 U. S. 8, 13):

> * * * we think Congress intended the term "written request for relief" to mean written notice presented prior to August 14, 1945, to an agency which was authorized to grant relief under § 201 of the First War Powers Act. Since there is no definition of the term in the

Act or regulations, and since the legislative history of the Act does not show that any settled usage of the term was brought to the attention of Congress, no particular form of notice is required. *But whatever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts.* [emphasis supplied.]

The claim submitted by petitioners to the contracting officer of the Civil Aeronautics Administration (Ex. 1) and petitioners' appeal from the contracting officer's decision on that claim (Ex. 4) do not seek extra-legal relief under the First War Powers Act or any other relief as a matter of grace. They seek payment as a matter of right, solely and exclusively under the provisions of the contract.

The action requested by the claim presented to the contracting officer is summarized on the first page of the claim, as "ELIMINATION OF ALL CLAIMS FOR LIQUIDATED DAMAGES FOR DELAY," and "ALLOWANCE OF ADDITIONAL COMPENSATION UNDER ARTICLES 3 AND 4 ON ACCOUNT OF ADDITIONAL COSTS INCURRED." The claim is addressed to the Contracting Officer and opens with the statement, "This communication is directed to you as Contracting Officer named in Negotiated Contract No.

c2ca 2053 * * *." (Ex. 1, pp. 1, 2). The first part of the claim requests remission of all liquidated damages as a matter of right, setting up two alternative grounds for such relief: (1) this Court's decision in *United States* v. *American Surety Company*, 322 U. S. 96 (Ex. 1, pp. 3-4) and (2) a contention that all delay was caused by the Government or by unforeseeable causes (Ex. 1, pp. 4-16). The balance of the claim consists of separate claims for individual items, each of which is specifically captioned as a claim for additional compensation under articles 3 and 4 of the contract (Ex. 1, pp. 17, 27, 29, 31). Moreover, petitioners included a claim for the cost of work performed for the purposes of inspection, stating that, "While this claim arises under Article 6(c) [of the Contract] instead of Article 3 or Article 4, it is inserted here because it is included in the statement of total costs." (Ex. 1, p. 29).

That petitioners thought of these claims as judicially cognizable claims is evidenced by the copious citations of court decisions (Ex. 1, pp. 3-4, 8-9, 14-15, 18, 22) and decisions of the War Department Board of Contract Appeals (Ex. 1, pp. 19, 20, 21, 28, 30-31) set out in the claim filed with the contracting officer. Despite the legal basis on which petitioners thus sought to establish their claims and on which they did receive payment of part of their claims, petitioners now point to certain demands for equitable adjustments contained

in the claim filed with the contracting officer (Pet. 10). Petitioners contend that these demands constitute general claims for extra-legal relief under the First War Powers Act. However, as found by the Court of Claims (R. 29), such demands were requests for equitable adjustments referred to in Article 3 of the contract (R. 7) and implicit in the terms of Article 4 (R. 7-8);[2] they were intended as such by petitioners (see Ex. 1, pp. 17-18) and so understood by the contracting officer.

Nor does the appeal taken by petitioners from the contracting officer's decision constitute a written request for relief within the meaning of Section 3 of the Lucas Act. The appeal specifically states, "All parties to said cause are notified and called upon to take notice of the entry of this appeal under and by virtue of the terms and provisions of Article 15 of said contract." (Ex. 4, p. 2). Like the claim submitted to the contracting officer, the appeal demanded equitable adjustments pursuant to articles 3 and 4 of the contract as a matter of right. It contained no intimation that the Civil Aeronautics Administration "was being asked to grant extra-legal relief under the First

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[2] Article 3 expressly provides for an "equitable adjustment" in the event of certain changes in the drawings or specifications and provides for submission of claims for such adjustments to the contracting officer, and, in the event of dispute, to the head of the Department pursuant to Article 15 (R. 12). Article 4 provides for modification of the contract in the event of certain changed conditions. See *United States* v. *Callahan Walker Constr. Co.*, 317 U.S. 56; *United States* v. *Rice*, 317 U.S. 61, 67.

War Powers Act for losses sustained in the performance of war contracts."

Petitioners contend, however, that articles 3 and 4 of the contract do not give rise to contractual rights (Pet. 8, 11, 15) and that they merely incorporated the powers granted the Civil Aeronautics Administration by the First War Powers Act and Executive Orders 9001 and 9116 (Pet. 7, 8, 15). That the argument for such incorporation is fallacious is manifest from the fact that the standard government construction contract as revised on September 9, 1935, contained articles 3 and 4 identical with those in petitioners' contract. 41 CFR 12.23 (1st Ed., 1939). Moreover, contractual provisions for the final settlement of disputes such as those in petitioners' contract have long been used by the Government and their validity sustained by this Court. *United States* v. *Wunderlich,* 342 U. S. 98; *United States* v. *Moorman,* 338 U. S. 457, 460-462. Such contracts give rise to contractual liability on the part of the Government, *United States* v. *Mason & Hanger Co.,* 260 U. S. 323; *United States* v. *Northeastern Construction Company,* 260 U. S. 326; just as they do in cases where private parties have utilized such provisions. *Sheffield etc. Railway Co.* v. *Gordon,* 151 U. S. 285; *Chicago & Santa Fe Railroad* v. *Price,* 138 U. S. 185.

Accordingly, the Court of Claims was correct in concluding that the claim filed by petitioners with

the contracting officer and petitioners' appeal from the contracting officers' decision did not seek extra-legal relief under the First War Powers Act or any other relief as a matter of grace, but instead sought payment as a matter of right, solely and exclusively under the provisions of the contract. Under the rule laid down in *Fogarty* v. *United States,* 340 U. S. 8, neither of those documents was a "written request for relief" within the meaning of Section 3 of the Lucas Act.

2. There is no conflict. Although petitioners contend that the decision of the Court of Claims in the case conflicts with previous decisions of that court (Pet. 13), the decisions of the Court of Claims cited by petitioners [3] were all decided prior to this Court's decision of the *Fogarty* case, *supra,* on November 6, 1950. Contrary to the implication contained in petitioners' contention, the decision of the Court of Claims in this case is in accordance with and supported by decisions of Court of Claims rendered since this Court's decision of the *Fogarty* case, *General Cas. Co. of America* v. *United States,* 101 F. Supp. 753 (C. Cls.); *Pennington* v. *United States,* 118 C. Cls. 610, 95 F. Supp. 817, as well as

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[3] *Howard Industries* v. *United States,* 83 F. Supp. 337 (C. Cls., 1949); *Milwaukee Engineering & Shipbuilding Co.* v. *United States,* 83 F. Supp. 348 (C. Cls., 1949); *Modern Engineering Co.* v. *United States,* 83 F. Supp. 346 (C. Cls., 1949); *Spicer* v. *United States,* 83 F. Supp. 345 (C. Cls., 1949).

the decisions of other courts, *Davidson* v. *United States,* 185 F. 2d 897 (C.A.D.C.); *Evans* v. *United States,* 101 F. Supp. 436 (E.D. Mo.); *Acme Fur Dressing Co.* v. *United States,* 80 F. Supp. 927 (E.D. N.Y.); *F. G. Vogt & Sons* v. *United States,* 79 F. Supp. 929 (E.D. Pa.). Moreover, contrary to petitioners' contention that the Court of Claims has extended the *Fogarty* decision far beyond its intent by narrowly restricting the claims which will be recognized as requests for relief (Pet. 18), other recent decisions of the Court of Claims show that it has considered the facts of each case and, in cases in which it believed such a construction was possible, the Court of Claims has applied a very liberal interpretation of the *Fogarty* decision for determining what constitutes a request for relief. *Humphrey* v. *United States,* 101 F. Supp. 759 (C. Cls.); *McKenzie* v. *United States,* 96 F. Supp. 944 (C. Cls.).[4]

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[4] Petitioners also contend that the decision of the Court of Claims in this case is inconsistent with the provision of Section 3 of the Lucas Act that "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act." (Pet. 12). However, the question presented in this case is not whether a settlement made pursuant to the terms of the contract bars further relief under the Lucas Act but whether the petitioners' claim of contractual rights constituted a written request for relief within the meaning of Section 3 of the Lucas Act. Accordingly, no question of the applicability of the above-quoted provision is here presented.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

No. [redacted] 49

HARRY W. SIMPSON, EDWARD F. SIMPSON AND F. W. SIMPSON, JR., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF SIMPSON CONSTRUCTION COMPANY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

GILES J. PATTERSON,
Counsel for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

No. 750

HARRY W. SIMPSON, EDWARD F. SIMPSON AND F. W. SIMPSON, JR., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF SIMPSON CONSTRUCTION COMPANY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

The Government's Brief says that the "sole question for decision" here is whether the Court of Claims correctly applied "the *principle* of Fogarty v. U.S., 34 U.S. 8, to the *particular facts* of this case;" but it does not distinguish between the "particular facts" of this case and the "particular facts" of the Fogarty case; it nowhere states "the principle of the Fogarty case," which the Court of Claims applied; it uses vague generalizations instead of the clear-cut distinction that exists between the invoices and bills filed by Fogarty prior to August 14, 1945 and Exhibits 1 and 4 filed by Petitioners prior to August 14, 1945.

First, we direct the Court's attention to the fact that the decision of the Court of Claims was that it had *no jurisdiction* over this proceeding. In its consideration of the Motion of the Government for summary judgment, the Court was restricted to pleadings and exhibits; that Motion also neces-

sarily admitted all material allegations of the Petition and Exhibits, among which were the following:-

(a) That Petitioners suffered a loss in the performance of their contract with the Government in an amount equal to the total original bid price (Exs. 1 and 4);

(b) That their loss was not the result of any fault or negligence on their part (Petition and Exs. 1 and 4) but was due to errors of Government officials in charge of the work, to changes made by them in the plans and specifications, to the fact that work not included in the plans and specifications was ordered to be performed, and for other reasons which, because of the express terms of Art. 3 of the contract did not "excuse the contractor from proceeding with the prosecution of the work so changed." The contractors proceeded with the work as ordered until they were required to desist therefrom;

(c) That the total cost to Petitioners for the actual performance of the work ordered was the reasonable cost of performing such work (Ex. 1, and specially Ex. 27 attached thereto);

(d) That Exhibits 1 and 4 were filed by Petitioners prior to August 14, 1945, with the contracting officer (Par. 4, p. 2 R) who, at that time, under the provisions of the First War Powers Act, had authority to grant "equitable relief from loss" as a "matter of grace,"—"extra legal relief"—to "alleviate hardships" imposed upon the contractors;

(e) That Exhibits 1 and 4 did expressly request relief for the loss incurred by them,—specifically for reimbursement of the amount expended by them in excess of the bid price.

On the contrary, the documents in the Fogarty case which were filed prior to August 14, 1945 and relied upon as "written requests for relief from loss" were "invoices and bills" for work performed, computed in accordance with the express terms of a contract, or for the value of property requi-

sitioned by the Government. This Court, in affirming the decisions of the lower courts, held that:

(a) These were "legal claims" as distinguished from "equitable claims for losses incurred in the performance of the contract;" the Court of Appeals had held that they were claims for which Petitioner had "a right to maintain an action at law against the Government" under Secs. 1346 and 1491, Title 28, U.S.C.A.;

(b) They were not "written requests for relief from losses;" for they did not allege that Petitioners had incurred a loss.

(c) The Lucas Act deals with an entirely different character of claims; those for which "the United States was never, by force of contract, obligated to pay, but which, like the First War Powers Act, contemplated relief of grace and not in recognition of legal rights."

Neither the Court of Claims nor the Brief of the Government recognizes these radical differences between the documents filed by Fogarty and those filed by the Petitioners; nor that under the express statements in the opinions of the Courts in that case, Exhibits 1 and 4 of this case were not "legal claims." Decision of that question,—"the sole question of law in this case,"—was evaded by calling them "contractual claims" based upon Articles 3 and 4 of the contract, in which the Government agreed to "equitably adjust" compensation under the circumstances therein stated. The Court of Claims did not hold, and the Government's Brief does not assert,—because they could not—that Petitioner could have maintained an action at law against the United States on either Exhibit 1 or Exhibit 4 for the loss it sustained—the amount by which the cost of the work performed exceeded either the bid price or that price plus the "adjustment" made by the contracting officer.

On the contrary, the Brief (p. 9) relies upon decisions of this Court which held that provisions similar to those of Art. 15 of Petitioners' contract are valid. It cites U.S. v. Moor-

man, 338 U.S. 457, where this Court reversed the Court of Claims because it reconsidered the facts and allowed Petitioners more than had been allowed by the contracting officer. Apparently the Government did not realize that those cases also held that where such a clause is included in the contract there can be no "legal claim" by the contractor against the Government under such clauses as Articles 3 and 4, upon which an action at law can be maintained, until the contracting officer has determined the amount. (U.S. v. Callahan-Walker Construction Co., 317 U.S. 56-61.) If no allowance be made, the officer's decision is conclusive that the contractor has no *legal claim* thereon and can recover nothing.

The opinion of the Court of Claims and the Brief of the Government both insist that the allowance made by the contracting officer to Petitioners was only under Articles 3 and 4 of the contract, but impliedly admit (Note 4, p. 11 of the Brief) that that allowance was not final or conclusive, because under Sec. 3 of the Lucas Act "a previous settlement shall not preclude further relief otherwise allowable" under that Act.

The contracting officer's report (Ex. 3) did not refer to powers granted him by the First War Powers Act, nor did he purport to utilize those powers to grant relief to Petitioner from loss. The Court of Claims held that this was evidence (?) that Exhibits 1 and 4 were "contractual claims," implying,—but carefully refraining from deciding, —that they were "legal claims." This it did, notwithstanding the fact that the sole question before the Court was one of its jurisdiction to grant "further relief." The Court of Claims strictly construed the detailed terms, specifications, unit prices, etc. of the contract as if it were retrying the merits of an action at law upon the contract, construed the contract strictly and resolved all doubts against Petitioners. If this were the purpose of the Lucas Act, why did that Act provide that a settlement on the contract did not preclude further relief by the Court of Claims as a "matter of grace"

to "alleviate hardships" imposed upon the contractor by the Government? This was not proper matter to be considered in connection with a decision as to whether the Court had jurisdiction of the Petition, much less to support the entry of a summary judgment against the Petitioner, denying it even an opportunity to present evidence of the facts alleged.

The Court of Claims did not, by express language, reverse its previous decisions, but its decision was wholly inconsistent therewith. (See pp. 14 and 15, former Brief.) The Government's Brief impliedly admits this by saying that those decisions were rendered before the decision in the Fogarty case. Yet, neither the Brief nor the opinion of the lower court attempts to show or explain why the Fogarty decision required such a change in its application of the Lucas Act.

The Government also says, that since the decision in this case the Court of Claims has "applied a very liberal interpretation of the Fogarty decision for determining what constituted a request for relief." This is another broad generalization without definite meaning. But it necessarily implies that the Court of Claims now determines its own jurisdiction in each case by an exercise of its discretion rather than according to the rule of law adopted by this Court; that it does not enforce the distinction made in the Fogarty opinions between "legal claims" on the one hand and "equitable claims for losses in the performance of the contract" on the other; in short, it does not apply the "principle" upon which the Fogarty case rests. As a result, the confusion caused thereby in that Court's subsequent decisions is now apparent from the opinions in Depew Paving Co. v. U.S. where the dissent is by the writer of the opinion in this case. DePew Paving Company has filed a Petition for a Writ of Certiorari to review that decision alleging that it is inconsistent with the decision in this case as well as with that of the Fogarty case.

The Writ of Certiorari should be granted.

Respectfully submitted,
Counsel for Petitioners

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